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June 26, 1997

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Michael L. Eckstein, Attorney at Law
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Ms. Miriam Hill
Axxon Corporation
101 West Robert E. Lee
New Orleans, Louisiana 70124

Re: Axxon Corporation v. David Newman,
Eastern District of New Orleans, No. 95-0796

Dear Mike and Miriam:

Enclosed is the transcript of Eckhard Kuesters' deposition on June 20, 1997. As you know, the deposition was not completed and will be re-noticed for a later date.

With kind regards, I am,

Sincerely,


Bryan C. Reuter

RECEIVED

NOV 26 1997

BCR/jeb
Enclosure

OBLON, SPIVAK, McCLELLAND
MAIER & NEUSTADT, P.C.

274083/1

EXHIBIT

14

EXHIBIT 14
BLO REUTER & P.C. 10/1/97
A I... of return, pc...

In The Matter Of:

*AXONN CORPORATION v.
DAVID NEWMAN & DAVID NEWMAN & ASSOC., P.C.*

ECKHARD KUESTERS

June 20, 1997

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
CONFIDENTIAL
AXONN CORPORATION,
Plaintiff,
vs. Case Number: 95-0796
DAVID NEWMAN AND
DAVID NEWMAN & ASSOCIATES,
P.C. AND ABC INSURANCE CO.,
Defendants. PAGES 1 - 100
Deposition of ECKHARD KUESTERS, held at the offices of
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.,
1755 Jefferson Davis Highway, Arlington, Virginia,
commencing at 9:02 a.m., Friday, June 20, 1997, before
KAREN YOUNG, Notary Public.

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APPEARANCES OF COUNSEL
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Page 3
C O N T E N T S
WITNESS: ECKHARD KUESTERS
EXAMINATION BY PAGE
Mr. Wolbrette 4
DEPOSITION EXHIBITS
ECKHARD KUESTERS
NUMBER DESCRIPTION IDENTIFIED
1 Bills 33
2 Bill of 4/28/95 33
3 Declaration of Donald L. Schilling, Ph.D. 93

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[1] ECKHARD KUESTERS, [2] having been
first duly sworn by [3] Karen Young, a
Notary Public [4] within and for the
Commonwealth of [5] Virginia, was ex-
amined and testified as [6] follows:
[8] EXAMINATION CONDUCTED
[9] BY MR. WOLBRETTE:
[10] Q: Would you state your name
please?
[11] A: Eckhard Kuesters.
[12] Q: And where do you reside, Mr.
Kuesters?
[13] A: Florence Road in Woodbine,
Maryland. 3145 [14] Florence Road,
Woodbine, Maryland.
[15] Q: You are an attorney; is that cor-
rect?
[16] A: That's correct.
[17] Q: And you practice with the firm of
Oblon, [18] Spivak? Did I pronounce it
right?
[19] A: Oblon, Spivak, et al., PC.

[20] Q: In Arlington, Virginia?
[21] A: Correct.
[22] Q: And do you have a specialty?
Page 5
[1] A: Patent law.
[2] Q: And could you —
[3] A: Intellectual property law.
[4] Q: Are you a member of the patent
law bar?
[5] A: Yes, I am.
[6] Q: Could you give us a very brief
background, [7] your education, law
school?
[8] MR. USDIN: Before we start, just to get
[9] the formalities out of the way, this
deposition will [10] be taken subject to
the provisions of the [11] confidentiality
order under the current documents. [12]
All documents being provided are being
provided [13] subject to the provision of
that confidentiality order [14] will be
considered confidential. We will need
those [15] produced in accordance with
that. Anything that's not [16] marked
needs to be marked, and if it was
inadvertently [17] not marked, it still
needs to be marked.
[18] MR. WOLBRETTE: No problem.

[19] MR. LIPMAN: As long as we've in-
terrupted [20] the flow of your ques-
tioning, let me just say that as [21] you
know, we discussed off the record, I'm
here [22] representing the witness him-
self and the law firm for

Page 6
[1] which he's employed.
[2] BY MR. WOLBRETTE:
[3] Q: And Mr. Kuesters, I'd asked you just
to [4] give me a brief resume.
[5] A: Well, I graduated from Rutgers, the
state [6] university, New Brunswick, New
Jersey, Rutgers [7] College, in 1968, B.S. in
electrical engineering. I [8] thereafter
went to work for Westinghouse Electric
[9] Corporation, worked for Westing-
house for seven years [10] as a design
engineer, starting as an associate [11]
engineer and finishing as a senior en-
gineer.
[12] Four years into my time at Wes-
tinghouse, I [13] began law school at night
at the University of [14] Maryland School
of Law in Baltimore, Maryland and [15]
finished up law school in January of
1977 is the [16] graduation date. In August
of 1976, I left [17] Westinghouse and
joined the firm of Oblon, Spivak. [18]
Then it was called Oblon, Fisher et al.,
P.C.

[19] Q: And are you a partner or the
equivalent of [20] the structure of this
firm?
[21] A: I am a member of the firm. The title

as [22] partner — it's a title.

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[1] Q: I understand. And how long have
you been [2] either a partner or a member
of the firm?
[3] A: Since 1981.
[4] Q: You have the right to read and sign
the [5] deposition. Do you want to do
that?
[6] MR. LIPMAN: Yes, you do.
[7] THE WITNESS: Yes, I do..
[8] BY MR. WOLBRETTE:
[9] Q: Mr. Kuesters, it appears to me that
you [10] have not had much experience
in depositions before; is [11] that correct?
[12] A: That is very correct.
[13] Q: You're not — or are you involved
in [14] litigation?
[15] A: Seldom. If so, only in the support
[16] capacity.
[17] Q: Well, I know that you have an
excellent [18] attorney next to you who's
representing you, and I [19] know that the
fellows representing Axonn are ex-
cellent [20] attorneys, and I suspect some
of them may have [21] explained to you
how this works, but very briefly, I [22] ask
you questions. If somebody feels that the

Page 8
[1] question is improper for some reason,
they will [2] object. If that happens, let
them get their objection [3] in before you
answer. You may be told then to answer
[4] or not to answer, as the case may be.
And if you're [5] told to answer, go ahead
and answer.

[6] If you don't understand anything I say —
[7] and that's quite possible because I am
not a patent [8] lawyer, not do I have any
kind of technical [9] background. Please
tell me if I say something [10] nonsensical,
which is quite possible, or get the terms
[11] confused, please let me know and I
may ask you to help [12] me get those
things right. The idea is we need to [13]
communicate. And if I don't understand
what you've [14] said, I'll ask you.

[15] A: Okay.
[16] Q: Were you served with a subpoena
in this [17] case?

[18] A: Yes, I was.
[19] Q: And do you have a return to make
on that [20] subpoena? Before we get to
that, we were informed [21] before we set
this thing up that you were not [22]
available after 12 p.m. or noon today, and
I've been

Page 9
[1] told since I got here that you may need
to leave at [2] 11; is that correct?

[3] A: That's correct.
[4] Q: Believe me, I want to accom- Mi

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moderate you. As [5] another lawyer, I hope you understand we've got a [6] lawsuit here and we've got deadlines imposed by a [7] federal judge. As long as you are agreeable that [8] you'll make yourself available, say, sometime within [9] the next 30 days at your convenience, I don't have any [10] problem at calling a stop to this at 11:00.

[11] A: I'm agreeable.

[12] Q: If we need to go on. I don't know if we [13] will or not. We'll see.

[14] MR. USDIN: And I think we talked about and [15] that we agreed if we do need to continue with the [16] deposition, that it could be done by phone.

[17] MR. LIPMAN: Steve, we will try to do that. [18] The only problem I have with that is if we've got a [19] lot of documents, sometimes it's been my experience [20] it's very awkward. Believe me, I have no desire to [21] come up here. As much as I like Washington, it's [22] about the worst place outside of New Orleans in the

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[1] summer. So if it is able, we can do that, but it's [2] conceivable that we might have to — it might be just [3] easier to do it. So I think we'll leave that option [4] open, but I will make every effort if we have to come [5] back to do it by telephone. We don't want to [6] inconvenience you or the witness [7] MR. USDIN: We will reserve our right to [8] object to coming back.

[9] MR. WOLBRETTE: Sure.

[10] MR. USDIN: And my understanding was that [11] — well, you knew in advance that it was going to be [12] finished by noon and we're not objecting to keeping it [13] open, but we want to do it by phone unless there's [14] some compelling reason not to.

[15] MR. WOLBRETTE: I understand your position. [16] We're just reserving our rights to do otherwise.

[17] BY MR. WOLBRETTE:

[18] Q: I'd asked you about the subpoena. Have you [19] produced some documents this morning in response to [20] that subpoena?

[21] A: Yes, I have.

[22] Q: May I see the documents?

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[1] MR. USDIN: This is the only copy, and [2] copies need to be made, and these need to be marked — [3] well, they're marked as confidential.

[4] BY MR. WOLBRETTE:

[5] Q: Have any documents been removed from what's [6] been produced or [7] excluded from what's been produced?

[8] A: Yes, I have. April of

[8] MR. LIPMAN: Why don't you take it one at a [9] time? I'm not sure the witness even knows what [10] "redacted" means.

[11] BY MR. WOLBRETTE:

[12] Q: Okay. What I'm trying to find out is we [13] sent you a request, a fairly broad request for various [14] categories of things, and I'm just trying to find out [15] if there were things that were felt to be within those [16] categories but that for some reason, privilege or [17] otherwise, were not included in what was produced to [18] us.

[19] A: Well, generally I tried to produce [20] everything you requested. Where there was material [21] covered by a privilege, that was blacked out.

[22] Q: All right.

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[1] A: Does that answer your question?

[2] Q: So there will be items — we're going to [3] let other counsel make a statement, but there are some [4] items that are either in this production, pieces of [5] paper that are in this box that have blacked out areas [6] on them. That's what I would call a redaction.

[7] A: Oh-huh.

[8] Q: Are there any documents, total whole [9] documents that have not been produced because the [10] entire document was felt to be privileged or for some [11] other reason not produceable?

[12] A: No.

[13] MR. USDIN: Can I consult with him a minute [14] and make sure?

[15] MR. WOLBRETTE: Sure. We're all just [16] interested in getting an accurate description of [17] these.

[18] THE WITNESS: Oh, my communications with [19] the client, Axonn, are not being provided.

[20] BY MR. WOLBRETTE:

[21] Q: So any document that would in some way be a [22] communication between you and Axonn has not been

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[1] included in the production?

[2] A: Correct.

[3] Q: And that would be either Axonn to you or [4] you to Axonn?

[5] A: Correct.

[6] Q: What about if you had telephone [7] conversations with Axonn or Axonn's counsel and if you [8] made notes of that or a memorandum or something of [9] that nature based on —

[10] A: That would not be included.

[11] Q: And there are such things?

[12] A: Not to my recollection.

[13] Q: Let me see if I can be a little bit

more [14] precise on that.

[15] MR. LIPMAN: I was going to object that [16] there was no foundation, but you can take it any way [17] you want.

[18] BY MR. WOLBRETTE:

[19] Q: You're absolutely correct, Counsel. I [20] noticed in — a production has previously been made of [21] your bills to me and I'm going to ask you about those, [22] but there were references in the bills to

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[1] conversations with Mr. Eckstein, Mr. Fant, [2] Mr. Sanderford, Mr. Newman and others. Is it your [3] practice to make notes or a memorandum or in some way [4] record in writing the substance of those [5] conversations?

[6] A: Not generally.

[7] Q: Do you know if you did at any time in any [8] of these conversations that you had involving this [9] case?

[10] A: I do not recall.

[11] Q: So sitting here now, it's your — is it [12] your testimony that there probably are no such written [13] recordings of those telephone conversations that you [14] had with either your client or with Mr. Newman?

[15] A: That's correct.

[16] Q: So therefore, there wouldn't be anything to [17] withhold?

[18] A: That's correct.

[19] Q: And when I say "client," I'm speaking of [20] Axonn. That was your client, correct?

[21] A: That's correct.

[22] Q: And you spoke to a number of people who

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[1] have some capacity with respect to Axonn.

[2] A: That's correct.

[3] Q: As I said, it would include Sanderford and [4] Fant and Eckstein; is that correct?

[5] A: Yes.

[6] Q: And was there anybody else that you spoke [7] with?

[8] A: I can't say with certainty. I can [9] speculate. The likelihood would be Kathy Dixon.

[10] Q: What was her position?

[11] A: I think she's basically Mr. Sanderford's [12] secretary.

[13] Q: Was Erin Pierce one that you ever spoke to?

[14] A: Not that I recall.

[15] MR. USDIN: So the record is complete, [16] there may have been some conversations with us

[17] Q: Okay. Have you had any communication with [18] counsel for Axonn in the suit that brings us here, [19] that is, the Stone, Pignian firm or their predecessor, [20] what it — Robert Crutcher?

[21] MR. USDIN: There were two firms that [22] Mr. Crutcher was with.

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[1] A: When?

[2] Q: At any time.

[3] A: Yes.

[4] Q: And did you make any written records of [5] your discussions, with them?

[6] A: No.

[7] MR. LIPMAN: Mr. Kuesters, I just ask you [8] to hesitate a moment before you answer the questions.

[9] BY MR. WOLBRETTE:

[10] Q: Yeah, I should have told you that. [11] Everybody does that because in ordinary conversation, [12] that's how we behave, but it's difficult for the court [13] reporter to take us down, although they're incredible, [14] — their ability to do that, but it's better if we [15] don't speak at the same time.

[16] A: I apologize.

[17] Q: Everybody does it and the lawyers do it [18] too. I was asking you, did you make any written [19] record of any conversations, whether telephone [20] conversation or in-person conversations, that you may [21] have had with Axonn's outside counsel in this [22] litigation?

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[1] A: No.

[2] Q: Thank you. You also I think spoke with me [3] and Ms. Manning concerning the revival attempt.

[4] A: I believe that's true.

[5] Q: Did you make any written record of our [6] conversations?

[7] A: Not that I recall.

[8] Q: Did you include in this box that [9] Ms. Manning is now looking at your bills?

[10] A: Yes.

[11] Q: I'm sure we're going to take a break, and [12] what I'm probably going to ask you to do at a break is [13] to look at the bills that I've got that have been [14] previously produced to me and compare them with what [15] you've got there. I just want to make sure I have a [16] complete set of everything. And can you tell me how [17] you kept the bills in this case? In other words, did [18] you try — were you segregating out the charges [19] dealing with the revival effort, were you segregating [20] that particular patent as opposed to other work that [21] you were

doing, or was there just one general bill for [22] Axonn?

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[1] MR. LIPMAN: Objection, form and [2] foundation. Only answer to the extent you personally [3] have knowledge as opposed to what the firm may have [4] done.

[5] Q: Would it help to look at these? I'm just [6] trying to find out —

[7] A: Yes, it would help to look at the bills. [8] Let me tell you where I'm coming from. A claim is [9] being made for your fees in this case, so I just want [10] to make sure that the fees that we're talking about [11] are fees that are associated with what's going on in [12] this case and not something else.

[13] A: Sure.

[14] Q: So I'm just trying to find out, look at [15] your bills, if you could tell us how the bookkeeping [16] structure was set up, if you know.

[17] A: What exactly is the question?

[18] Q: The question is was the billing in [19] connection with the abandoned patent — if I say that, [20] you'll know what I'm talking about?

[21] A: Yes.

[22] Q: As far as I know, there's only one

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[1] abandoned patent. Do you know of any more than one? [2] Do you know of any other patent that was abandoned?

[3] A: This is the only one that I worked on.

[4] Q: Right. Were the bills for the one that you [5] worked on, the abandoned patent — were those bills in [6] the way that the bills were sent out, the bookkeeping [7] method — were those the fees that you charged for [8] your efforts segregated from any other work that you [9] may have been doing for Axonn?

[10] A: At the time, I was doing no other work for [11] Axonn.

[12] Q: Since the application was revived, have you [13] done other work for Axonn?

[14] A: Yes.

[15] Q: And are any of the bills that you have sent [16] Axonn for other work included within the bills that [17] you have provided us?

[18] A: Yes.

[19] Q: What other work have you done for Axonn [20] other than the revival for which you have provided us [21] bills?

[22] MR. LIPMAN: Just a minute, Mr. Kuesters.

[1] Mr. Kuesters, in answering that question, please [2] answer it in a general manner at this point in time, [3] and in answering it, please be careful not to reveal [4] the substance of any communications with your client [5] that would possibly be privileged or work product [6] information. But for right now, answer that question [7] generally to the extent you can.

[8] A: Primarily prosecution, patent prosecution.

[9] Q: And is this prosecution of the abandoned [10] patent that was later revived or is it prosecution of [11] other patents?

[12] MR. LIPMAN: Objection, form, ambiguous.

[13] MR. WOLBRETTE: Well, it's difficult not to [14] be ambiguous since you advised him to answer [15] generally, and he did, and I'm trying to find out, we [16] have a stack of bills that's been produced, claims [17] have been made for his fees. There's been no [18] specification as to which fees are being claimed, and [19] I'm trying to find out which of these bills relate to [20] the revival effort.

[21] MR. LIPMAN: Why don't you ask the [22] question?

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[1] MR. WOLBRETTE: The case of the lawsuit and [2] which of them relate to other things, and I think [3] that's exactly the question that I asked him when you [4] advised him to answer generally. That's what I'm [5] trying to get to. Can you help me out with that, [6] Mr. Kuesters?

[7] MR. LIPMAN: Counsel, ask a pointed [8] question and Mr. Kuesters will answer it.

[9] MR. USDIN: What is the question?

[10] MR. LIPMAN: The question was can you help [11] him out, and I guess the answer is he can help you [12] out.

[13] BY MR. WOLBRETTE:

[14] Q: Fine. Tell me which one of the bills in [15] front of you relate to the revival of the abandoned [16] patent and which of them relate to prosecution of that [17] patent or other patents.

[18] A: All bills which are under our reference [19] number 6926-002-20 DIV involve the application which [20] was abandoned and which was revived. Up until the [21] revival — or after the revival, there was no [22] substantive prosecution. The case was allowed, and I

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[1] believe that the only bill under that docket number [2] after revival, which would have been prosecution per [3] se, would have been for payment of the

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(5) Page 16 - Page 22

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base issue fee (4) and what other fees were associated with that. All (5) other bills prior to that time would have been for the (6) revival effort.

(7) Q: And what are the bills for file number (8) 6926-004-20 CONT for?

(9) A: I'm sorry. Would you repeat the number?

(10) Q: 6926-004-20 CONT. What are those bills (11) for?

(12) MR. LIPMAN: You're referring to the stack (13) of documents that are not an exhibit in this case in (14) front of the witness? Is that what you mean?

(15) MR. WOLBRETTE: I'm referring to the stack (16) of documents, as I've been referring to since we've (17) started this line of questioning, that were produced (18) to us today that you have your hand on that we've been (19) referring to.

(20) MR. LIPMAN: I was just trying to help you (21) out, Counsel, because Mr. Kuesters doesn't remember (22) all these numbers and there's one that I turned to

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(1) that has that number that might help the witness. (2) Just trying to help you out.

(3) A: 6926 refers to Axonn. 004 is an item (4) number. 004 is a continuation of the 002 case, which (5) was filed in the patent office.

(6) Q: Is this a continuation in part?

(7) A: No.

(8) Q: Continuation?

(9) A: Continuation.

(10) Q: Is it the same pattern that was involved in (11) the abandoned patent?

(12) MR. LIPMAN: Objection, vague, and (13) ambiguous.

(14) BY MR. WOLBRETTE:

(15) Q: Is it the same patent or is it a different (16) patent?

(17) MR. LIPMAN: Same objection.

(18) Q: Do you understand the question?

(19) A: Can we go off the record?

(20) MR. LIPMAN: No. If he cannot get the (21) question right, that's —

(22) Q: Does the continuation lead to a different

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(1) patent other than the one that was abandoned?

(2) A: Correct.

(3) Q: So this is work on something that would (4) lead to an additional patent with the patent office, (5) for instance?

(6) A: That's correct.

(7) Q: This is not part of the revival effort, is it? (8) That correct?

(9) MR. LIPMAN: Objection, vague and (10) ambiguous.

(11) MR. USDIN: Objection.

(12) MR. LIPMAN: If you understand the (13) question, answer it.

(14) A: It's not.

(15) Q: It's not. Okay. And is the work that's (16) contained on that bill or any of the bills with that (17) number — was that done after the abandoned patent was (18) revived?

(19) MR. USDIN: Which bills are you referring (20) to?

(21) MR. WOLBRETTE: The 6926-002-20 CONT.

(22) MR. LIPMAN: There are multiple bills.

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(1) MR. WOLBRETTE: Right. You can go ahead (2) and take a look at them.

(3) THE WITNESS: I don't recall the date that (4) the 002 case was revived.

(5) MR. WOLBRETTE: February 1996 was the (6) decision.

(7) MR. LIPMAN: That doesn't necessarily mean (8) that's the date as a matter of law that the case was (9) revived, but nonetheless, you can answer the question (10) if you can.

(11) A: We began preparation of the continuation (12) before the revival in anticipation and being (13) optimistic that it would be revived, or hopeful, (14) anyway.

(15) Q: If it had not been revived, would this work (16) have been for naught?

(17) MR. LIPMAN: Objection, speculative.

(18) A: He objected.

(19) Q: You can answer. Unless he feels (20) not to (21) answer, you can answer.

(22) A: Yes.

(1) Q: And there's a third file number,

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(1) 6926-007-20 CONT, that is referenced in this stack of (2) documents. Can you tell me what that refers to?

(3) A: This is a further continuation, application (4) off of the 004 case.

(5) Q: And when did the work begin on this file?

(6) MR. LIPMAN: Objection, vague and (7) ambiguous. Mr. Kuesters, are you answering that (8) question based upon the documents or based upon your (9) memory?

(10) A: I don't recall exactly when the work began.

(11) Q: Can you tell me when the

(12) first charge was made?

(13) A: Probably mid April of '97.

(14) Q: So — all right. And the work that was (15) done in connection with this 6926-007-20 CONT was not (16) in connection with the revival effort, was it?

(17) MR. USDIN: Objection, vague.

(18) A: The 002 case was already revived before we (19) began the 007 continuation.

(20) Q: Okay. Is 007 going to lead to a new (21) patent?

(22) MR. LIPMAN: Objection, speculation.

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(1) Q: Is it intended to lead to a new patent?

(2) A: Yes.

(3) Q: Any decision from the patent office on (4) that?

(5) A: No.

(6) MR. LIPMAN: Hold on a second. I didn't (7) hear the question.

(8) MR. WOLBRETTE: Any decision from the (9) patent office on that, and the answer was no.

(10) MR. LIPMAN: I heard the answer. I just (11) didn't hear the question. I was just asking as a (12) courtesy to hear the question again.

(13) Q: Was the work that you did for Axonn in (14) connection with the revival of the abandoned (15) application — was that the first time you had done (16) work for Axonn?

(17) A: Yes.

(18) Q: Can you tell me how it came about that you (19) did this work, that you were engaged to do this work? (20) In other words, did they call you and say we want you? (21) Did they interview you? How did this come about? Do (22) you know?

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(1) MR. LIPMAN: I object to the question (2) to the extent it seeks disclosure of privileged or work (3) product information.

(4) MR. WOLBRETTE: I'm not asking for (5) communications. I'm just trying to find out (6) mechanically what happened.

(7) MR. LIPMAN: Nevertheless, I have the same (8) objection and the same caution to the witness. You (9) may answer it, but in answering it, please don't (10) reveal the substance of any privileged or work product (11) information that might be raised in that question.

(12) THE WITNESS: I was contacted by Axonn.

(13) BY MR. WOLBRETTE:

(14) Q: Who at Axonn contacted you?

(15) A: Michael Eckstein.

(16) Q: And do you know he was talking

to other (17) people besides you? In other words, was it a beauty (18) contest or were you the guy?

(19) MR. USDIN: Objection. I think that's (20) probably going to call for the disclosure of the (21) substance of his communications. You don't want him (22) to get into that.

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(1) Q: All right. Michael Eckstein contacted you (2) and ultimately you began working on this project to (3) revive the abandoned patent?

(4) A: That's true.

(5) Q: What did you do in order to prepare (6) yourself to work on this case?

(7) MR. LIPMAN: I object to the question. To (8) answer that question would reveal the mental processes (9) and thoughts of Mr. Kuesters on behalf of his client, (10) which would involve the disclosure of privileged or (11) work product information. As a result, I instruct the (12) witness not to answer the question.

(13) Q: Counselor, we have received unredacted (14) bills for Mr. Kuesters detailing meetings, review of (15) the decision, the PTO's decision, portions of the file (16) history, discussions with Mr. Eckstein, obtaining the (17) file wrapper history. I think any — I'm not asking (18) for communications. I'm asking what he reviewed, and (19) I don't see that that's privileged and I certainly (20) think it's been waived if it was at all, so I ask you (21) to reconsider in light of the fact that these have (22) been disclosed to us already.

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(1) MR. USDIN: Any — there is no waiver. The (2) privilege has continually been asserted and there has (3) been no waiver. If there was any documents that were (4) inadvertently produced, then that's an inadvertent (5) production. But notwithstanding that, that is not a (6) waiver of any privilege. We stand by our privilege.

(7) BY MR. WOLBRETTE:

(8) Q: I certainly don't want to get into a legal (9) argument. Obviously we're going to have one later. A (10) claim is being made for the fees that Mr. Kuesters (11) charged. We have a right to inquire what he did to (12) earn those fees to determine whether they are proper, (13) necessary, appropriate, reasonable and related to this (14) case. And so I guess I'll ask it specifically. (15) Mr. Kuesters, is the first entry that you have of time (16) in connection with the revival effort of the abandoned (17) patent and application April the 4th, 1995?

(18) MR. LIPMAN: Objection, lacks foundation.

(19) Q: Could you review your bill and

see?

(20) MR. LIPMAN: The question assumes facts not (21) in evidence.

(22) MR. USDIN: Can I see?

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(1) MR. WOLBRETTE: This is the file of bills (2) that Axonn turned over to us, and there are no (3) redactions on the bills themselves as far as I can (4) see.

(5) MR. LIPMAN: Let's go off the record for a (6) second.

(8) (Discussion off the record)

(10) BY MR. WOLBRETTE:

(11) Q: Mr. Kuesters, you have in front of you the (12) bills that you are producing today, right?

(13) A: That's correct.

(14) Q: And we've been talking about them. And we (15) will mark them as an exhibit. I don't know what (16) number we're going to give to them. We'll make it (17) Defendant 1. We'll ask the court reporter to mark the (18) bills as Defendant 1, okay, the bills produced in (19) response to the subpoena. Looking through those (20) bills, can you tell me whether the first day on which (21) you made a charge in connection with the revival (22) effort was April the 4th, 1995?

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(1) MR. LIPMAN: Go ahead.

(2) A: Not from the bills that I have in front of (3) me. These bills —

(4) Q: Do you not have the April 28, 1995 bill in (5) front of you?

(6) A: That's correct.

(7) Q: Was that bill removed as privileged from (8) the stack of bills that you're producing today?

(9) MR. LIPMAN: Objection to the form of the (10) question.

(11) A: Apparently it was not included by my (12) billing department.

(13) Q: I understand that sometimes things don't (14) get included inadvertently and that other times they (15) are intentionally taken out for other reasons. I'm (16) just trying to find out if this was something that was (17) intentionally taken out or was this something that was (18) inadvertently — can you explain why this was not put (19) in?

(20) MR. LIPMAN: Objection, foundation. Go (21) ahead. If you know, Mr. Kuesters. If you don't know, (22) don't guess.

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(1) A: I was told there was no bill for April.

(2) Q: Okay. Mr. Kuesters, I understand lawyers (3) have to depend on the bookkeeping department. I know (4) I do

and from time to time I'm embarrassed by things (5) that they do or don't do, so I appreciate that and I'm (6) certainly not accusing you of doing anything wrong or (7) improper, but I have a bill here from April 28, 1995 (8) that's previously been provided to me by Axonn in this (9) case, so I'll mark that bill as — or ask the court (10) reporter to mark that bill or copy of it because it's (11) the only copy I've got with me, as Defendant 2. So (12) let me show you that bill. In fact, it might be best (13) if we made a copy of this now. Can we do that now? (14) Make copies for everyone?

(16) (Documents were marked as Defendant's (17) Exhibit Numbers 1 and 2.)

(19) BY MR. WOLBRETTE:

(20) Q: Mr. Kuesters, I think I had given you a (21) copy of Defendant Number 2, the April 28, 1995 bill, (22) and asked you if 4/4/95 was the first time anything

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(1) was billed to this file?

(2) MR. LIPMAN: Which file?

(3) MR. WOLBRETTE: The 6926-0001-002.

(4) MR. LIPMAN: Objection, foundation, vague (5) and ambiguous.

(6) THE WITNESS: I don't know.

(7) BY MR. WOLBRETTE:

(8) Q: Do you have any record that indicates there (9) was any earlier billing than 4/4/95 on this file?

(10) MR. LIPMAN: Objection, vague and (11) ambiguous, lacks foundation. Counsel, why don't you (12) look at the file numbers. They're different. I'll (13) help you out here so we can speed up the process. (14) You're assuming facts that you haven't yet (15) established, so we're trying to help you here. We're (16) not making any progress.

(17) Q: I see. Well, this bill says, our reference (18) 6926/001/20SD, your reference, Wireless Alarm System, (19) re: petition to revive. Is that right?

(20) A: Yes.

(21) Q: Does this deal with the abandoned patent?

(22) A: Yes.

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(1) Q: Does this deal with the attempt to revive (2) the abandoned patent?

(3) A: Yes.

(4) Q: And there's only one abandoned patent that (5) you know about that you've worked on for Axonn; is (6) that correct?

(7) A: Yes.

(8) Q: This is the one that David Newman was (9) involved in as prior counsel to

Axonnn; is that right?

[10] A: Yes.

[11] Q: Now, did you work on any other attempt to [12] revive besides the one that's shown on this April [13] 28th, 1995 bill? Any other attempt to revive any [14] other Axonn patent?

[15] A: No.

[16] Q: Do you have any record of any bill going [17] out before April 28, 1995 on this file?

[18] MR. LIPMAN: What file?

[19] MR. WOLBRETTE: The file we — we're [20] talking about what's referenced in the April 28th, [21] 1995 bill.

[22] THE WITNESS: Under 6926/001/20SD, the

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[1] answer is I don't know.

[2] Q: Do you have any recollection sitting here [3] of any earlier work other than as reflected on this [4] April 28th, 1995 bill, Defendant's Exhibit 2, in [5] connection with this file?

[6] MR. LIPMAN: Objection, vague and [7] ambiguous.

[8] A: I don't know.

[9] Q: How could you find out?

[10] A: I can call my billing department and ask [11] them for bills on the 001 case. I had forgotten that [12] there was — in our internal docketing, we assign a [13] different number once the case — once we actually [14] enter prosecution. The 001 case is different in terms [15] of short docket, indicating that it's not a patent application and it was preliminary to our becoming of [17] record in the patent application. To the extent that [18] billing begins on this bill on April 4th, I don't know [19] if there was billing in March or earlier.

[20] Q: Is that something you can find out while [21] we're here today?

[22] A: Yes.

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[1] Q: At the next break, we'll ask if your [2] counsel agrees that we try to find that out if this [3] is, what I've marked as Defendant 2 is the first bill. [4] When would the file number have changed from 001 to [5] something else? I'm not talking about the date, but [6] what event would occur that would cause a change in [7] that?

[8] MR. LIPMAN: Objection, lacks foundation.

[9] A: When we had a live patent application that [10] we were responsible for.

[11] Q: Would that be at the point — I don't know [12] what the exact term is in the patent field, but did [13] you become

the official counsel for Axonn when you [14] enter an appearance? Is that the point?

[15] MR. LIPMAN: Objection, hypothetical.

[16] A: In this case, I don't recall exactly what [17] the switch-over date was, but generally that's [18] correct.

[19] Q: I'm just trying to understand the basic [20] concept here. All right. Well —

[21] A: The 001 bills and the 002 bills refer to [22] the same revival effort.

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[1] Q: I appreciate that. I think I understand [2] now. And what you have in the stack in front of you [3] that's been marked Exhibit 1 didn't have the 001 [4] bills; is that correct?

[5] A: Correct.

[6] Q: Is there any way that you can tell from [7] this April 28th bill, Defendant 2, when the file was [8] opened?

[9] MR. LIPMAN: Objection, vague and [10] ambiguous.

[11] A: I don't understand the question.

[12] Q: Well, some file systems, some law systems [13] have a code in it that can tell you when the file was [14] first opened, or sometimes there are entries made that [15] indicate that. I'm just asking you if you can tell [16] from what's on this page —

[17] A: No.

[18] Q: Do you have a recollection of when it is [19] that you were first hired by Axonn?

[20] MR. LIPMAN: Objection to the extent the [21] question calls for a legal conclusion.

[22] A: I don't recall when I first talked to

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[1] Michael Eckstein. It was obviously before April 4th, [2] 1995.

[3] Q: Okay. On April the 4th, 1995, did you [4] resubmit PTO's decision on the petition and portions [5] of the file history and the application?

[6] MR. LIPMAN: Objection as to form. First, [7] are you asking based upon the document in front of him [8] that says that that you just read or are you asking [9] for an independent recollection, and nevertheless, I [10] object to the question since it calls for disclosure [11] of attorney-client information and work product [12] information and the thought processes engaged in by [13] the witness.

[14] MR. WOLBRETTE: Are you instructing him not [15] to answer the question?

[16] MR. LIPMAN: Well, first clarify what the [17] question is. I'm not instructing him not to answer [18] it. It speaks for itself.

[19] BY MR. WOLBRETTE:

[20] Q: Sitting here today, can you tell me from [21] your memory — and you may refer to this bill as you [22] wish to refresh your memory — do you have a

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[1] recollection sitting here today that on April the 4th, [2] 1995 you reviewed the PTO's decision on the petition [3] and portions of file history and application, SN?

[4] MR. USDIN: Objection as to form. I'm not [5] sure what you're asking him. You say sitting here [6] today based on his recollection. Then you tell him to [7] refer to the document. I object to the form of the [8] question.

[9] MR. WOLBRETTE: You don't understand the [10] concept of refreshing your recollection?

[11] MR. USDIN: Well, it's two different [12] questions is the problem. I do understand the concept [13] very well. What I don't understand is a question that [14] confuses the two concepts.

[15] BY MR. WOLBRETTE:

[16] Q: I see. I'll try to unconfuse it, Counsel. [17] Does this bill indicate that on 4/4/95 you, Eckhard [18] Kuesters, reviewed the PTO's decision on petition and [19] portions of the file history, application [20] SN07/782,345?

[21] MR. LIPMAN: Objection. The document [22] speaks for itself.

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[1] MR. WOLBRETTE: You can answer.

[2] MR. LIPMAN: You can tell him what the [3] document says.

[4] BY MR. WOLBRETTE:

[5] Q: Does it indicate that?

[6] MR. LIPMAN: You may confirm to him that [7] what he read was the correct reading because that's [8] what he's asking you to do.

[9] A: Referring strictly to the document, the [10] document doesn't say that.

[11] Q: Does the document say — the document does [12] say 4/4/95, review PTO's decision on petition and [13] portions of file history and application SN07/782,345. [14] Did I read that correctly?

[15] A: Correct.

[16] Q: Well, that is something for which a charge [17] is being applied, is it not?

[18] A: Uh-huh.

[19] Q: Is that correct?

[20] MR. LIPMAN: Just say yes or no or if you [21] don't know, say you don't know. [22] A: Yes.

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[1] Q: Okay. Who did that?
[2] A: I did that. I believe I did that.
[3] Q: Why do you believe you did that?
[4] MR. LIPMAN: Well, I object to the [5] question. The question calls for disclosure of [6] privileged or work product information and the thought [7] processes of the witness and I'm instructing him not [8] to answer the question.
[9] MR. WOLBRETTE: Are you instructing him not [10] to answer the question of why he believes that to be [11] the case?
[12] MR. LIPMAN: Yes, exactly.
[13] BY MR. WOLBRETTE:
[14] Q: On 4/4/95, did you discuss your view of the [15] PTO's decision of petition and portions of file [16] history and application SN07/782,345 with Michael [17] Eckstein?
[18] MR. LIPMAN: Same instruction, same [19] objection.
[20] MR. WOLBRETTE: Are you instructing him not [21] to answer?
[22] MR. LIPMAN: Yes.

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[1] Q: And Mr. Kuesters, you're going to follow [2] the instructions of your counsel not to answer, I [3] assume?
[4] A: I am.
[5] Q: In every case, are you? I mean, I can ask [6] you every time whether you're following his [7] instruction, but I don't really need to do that [8] because you are going to follow his instructions?
[9] A: That's correct.
[10] Q: Did you contact David Newman on April the [11] 6th, 1995 in connection with the petition to revive?
[12] MR. LIPMAN: Are you asking that question [13] independent of the document or based upon his memory? [14] Let's turn the document over. I don't care how you do [15] it, Counsel, but let's make clear what you're doing.
[16] BY MR. WOLBRETTE:
[17] Q: I'm asking him if he contacted David [18] Newman. He can look at anything he wants. I don't [19] care what he looks at. Did you contact David Newman [20] on April the 6th, 1995?
[21] MR. LIPMAN: I object to the form and it [22] also lacks foundation.

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[1] MR. USDIN: I think the objection I'm [2] raising is that it's not clear whether you're asking [3] him of independent recollection or does this bill [4] state that that happened, or I guess third, does the [5] bill refresh his recollection that that's what [6] happened. But it's three different questions and it's [7] not clear to us

which one you're asking.

[8] BY MR. WOLBRETTE:

[9] Q: Do you remember having a conversation with [10] David Newman on April the 6th, 1995? Let the record [11] reflect that Mr. Kuesters' counsel has turned the [12] April 28th, 1995 bill over. Do you recall having a [13] conversation with Mr. Newman on April the 6th, 1995?
[14] A: I have no independent recollection of on [15] what days I had conversations with David Newman.
[16] Q: How many conversations do you recall having [17] with David Newman?
[18] A: I have no count in my mind, although they [19] are numerous.
[20] Q: The bill in front of us says that you [21] discussed with Mike Eckstein on 4/4 your review of the [22] file history, does it not? That's what it indicates.

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[1] MR. LIPMAN: You want him to look at the [2] bill now?
[3] MR. WOLBRETTE: Yes.
[4] MR. LIPMAN: Is that what the bill says?
[5] A: Yes.
[6] Q: Do you have any notes or written memoranda [7] of your conversation with Mike Eckstein on that date?
[8] A: No.
[9] Q: When you do these bills, you try to be [10] accurate, don't you?
[11] MR. LIPMAN: Objection, foundation.
[12] A: When I do my bills I try to be accurate.
[13] Q: All right. And if you would put down an [14] entry that something happened on a particular day, [15] it's because that's the day it happened, right?
[16] A: Yes.
[17] Q: And I assume when you do this that you are [18] careful about making sure that the days are correctly [19] recorded that certain events happened; is that [20] correct?
[21] MR. USDIN: I object to the form of the [22] question as to what you assumed.

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[1] BY MR. WOLBRETTE:
[2] Q: You're right. When you go through and bill [3] a client and there are certain events recorded on [4] certain days, you're careful, aren't you, to make sure [5] that those dates are accurate?
[6] A: Yes.
[7] Q: I understand that from time to time [8] mistakes can happen, but you try to make sure that [9] they don't, do you not?
[10] A: I try to avoid mistakes.
[11] Q: And you review the bills before

they go [12] out?

[13] A: Yes.

[14] Q: All right. And how do you get the dates [15] that you put down on the bills? Do you take them from [16] time sheets, do you record them concurrently, are [17] there notes? Can you explain to me how that happens?
[18] MR. LIPMAN: Objection, form.
[19] Q: Go ahead.
[20] A: Generally concurrently.
[21] Q: So would you believe that the dates and the [22] events that are recorded on Defendant Exhibit 2 are an

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[1] accurate representation as to when things occurred?
[2] MR. LIPMAN: Objection, foundation.
[3] A: I believe so.
[4] Q: Before we go on with this, let me ask you [5] something about what your role is in this case, our [6] case. Have you been consulted as an expert by the [7] attorneys for Axonn?
[8] MR. LIPMAN: Objection, vague and [9] ambiguous, and I object to the form of the question [10] and also object to the extent it calls for disclosure [11] of privileged or work product information in the [12] question as phrased and I instruct the witness not to [13] answer it.
[14] Q: Have you been asked to give an opinion as [15] to whether David Newman breached the standard of care [16] for patent lawyers in his handling of this matter?
[17] MR. LIPMAN: Objection. To answer that [18] question, assuming it could be answered, would reveal [19] privileged or work product information relative to [20] this lawsuit and I instruct the witness not to answer [21] that question. And I'm sure it also probably violates [22] the pretrial order by the court in this case, of which

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[1] I have no knowledge.
[2] MR. WOLBRETTE: I just want to make sure I [3] understand. You're counsel for Mr. Kuesters; you are [4] not counsel for Axonn; is that correct?
[5] MR. LIPMAN: I am counsel for Mr. Kuesters [6] and the Oblon, Spivak firm.
[7] MR. WOLBRETTE: You're not counsel for [8] Axonn?
[9] MR. LIPMAN: That is absolutely correct.
[10] MR. WOLBRETTE: I have heard no objection [11] from Axonn's counsel to that question. I just want to [12] make sure, do you all object?
[13] MR. USDIN: I join in the objection. I too, I

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both to object to each (15) question. So far we have not been doing that.

(16) MR. WOLBRETTE: You represent different (17) parties, so I think you're going to have to do that.

(18) MR. USDIN: Then I join in the objection to (19) the question as phrased. This witness has been (20) subpoenaed as a fact witness.

(21) MR. WOLBRETTE: I understand that, and I'm (22) trying to find out if in addition to the facts that he

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(1) is aware of, if he has any other role in the (2) litigation.

(3) MR. LIPMAN: Why don't you ask him, for (4) instance, I mean — you know how to do this. Ask him (5) has he spoken to counsel. Let's take it one step at a (6) time so you can get some information and you won't get (7) others. But you want to go right for the home run in (8) the first question, my objection stands.

(9) BY MR. WOLBRETTE:

(10) Q: Have you been paid anything, any fee in (11) connection with this litigation that brings us here (12) today as opposed to the patent work that you did work (13) for Axonn?

(14) MR. LIPMAN: You mean such as the fee that (15) came with the subpoena?

(16) MS. MANNING: That was not paid by Axonn.

(17) BY MR. WOLBRETTE:

(18) Q: Have you been paid anything by Axonn or (19) Axonn's attorneys other — in connection with the (20) litigation that brings us here today as opposed to the (21) work that you do for them on patents?

(22) A: No.

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(1) Q: Have you been asked to send them a bill for (2) time or services in connection with this litigation?

(3) MR. LIPMAN: Objection. To answer that (4) question would reveal privileged or work product (5) information and I instruct the witness not to answer (6) the question.

(7) MR. USDIN: I join in the objection.

(8) BY MR. WOLBRETTE:

(9) Q: Have you met with counsel for Axonn in this (10) case?

(11) MR. LIPMAN: You may answer the question (12) yes or no.

(13) THE WITNESS: What do you mean by "meet"?

(14) BY MR. WOLBRETTE:

(15) Q: Talk to them on the telephone or in person.

(16) A: Ever. She had been talking for herself and to the

(17) Q: About this case, this litigation that (18) brings us here today.

(19) A: Yes.

(20) Q: How many times have you done so?

(21) A: Please clarify the question.

(22) Q: I'm not interested in discussions that you

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(1) may have had about the weather or the Washington, D.C. (2) area or what time you might be available for this (3) deposition. I'm asking you have you ever talked to (4) them, met with them, provided them with any (5) information concerning the substance of the (6) litigation, either what happened, what your role —

(7) A: What happened —

(8) MR. LIPMAN: Let him finish the question (9) before you answer it. Are you finished?

(10) BY MR. WOLBRETTE:

(11) Q: No. Either what occurred during your (12) attempt to revive, your view of David Newman's (13) behavior, what David Newman may have told you, any of (14) those sort of items? So the question I'm asking you (15) is have you met or how many times have you met with (16) counsel for Axonn in connection with this litigation?

(17) MR. LIPMAN: I object to the form of the (18) question. I'm still not sure what it is. It's that (19) last question, how many times have you met, if that's (20) the question —

(21) BY MR. WOLBRETTE:

(22) Q: That's the question, Counselor. How many

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(1) times have you met?

(2) A: There's no foundation.

(3) Q: I'm sorry. You're now objecting to my (4) questions too?

(5) MR. LIPMAN: Counsel, he asked you to (6) clarify between phone calls and meetings. You refused (7) to do that.

(8) Q: How many times have you spoken on the (9) telephone with counsel for Axonn in this litigation?

(10) A: No foundation.

(11) MR. LIPMAN: Well, wait. Mr. Kuesters, if (12) you can answer the question, fine. He's assuming of (13) course you did speak by telephone, so since he won't (14) ask the question cleanly, just tell him yes or no or I (15) don't know or I never spoke to him, so maybe we can (16) speed up the process.

(17) MR. WOLBRETTE: Well, if you've never (18) spoken to him the answer is

zero.

(19) MR. LIPMAN: Well, he's asking as a (20) foundation question. You're an experienced lawyer. (21) Say "Did you ever speak by phone?" "Yes." "How many (22) times?" I mean, that's the way it goes.

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(1) BY MR. WOLBRETTE:

(2) Q: Thank you, Counselor. How many times — (3) that asks for a number. How many times have you (4) spoken on the telephone with counsel for Axonn? If (5) you've never spoken to them, tell me that.

(6) A: I don't know what you mean by "about this (7) litigation."

(8) Q: Okay. Do you know what this litigation is (9) about?

(10) A: I believe it's malpractice.

(11) Q: Right. And do you understand that it has (12) to do with the abandoned patent?

(13) A: Yes.

(14) Q: And it has to do, since it's malpractice, (15) with the conduct of David Newman while he was the (16) patent lawyer for Axonn in connection with this (17) particular application, correct?

(18) MR. LIPMAN: Objection, foundation, also to (19) the extent it seeks a legal conclusion, I object to (20) it.

(21) BY MR. WOLBRETTE:

(22) Q: Do you understand that?

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(1) A: Would you repeat the question?

(2) MR. LIPMAN: Why don't you just have her (3) read it back?

(4) Q: No, let's just go on. Mr. Kuesters, you (5) obtained — as part of your effort to revive, you (6) obtained a declaration from Mr. Newman, did you not?

(7) A: Yes.

(8) Q: Which was filed in the patent office as (9) part of your first revival attempt, is that correct?

(10) MR. USDIN: As part of his first revival?

(11) MR. WOLBRETTE: Yes.

(12) MR. USDIN: You're talking about the one (13) that Mr. Kuesters did as opposed to any other revival (14) efforts?

(15) BY MR. WOLBRETTE:

(16) Q: Right. Now, according to this April 28th, (17) 1995 bill, Exhibit 2, you were reviewing the revised (18) draft declarations of Newman, Perilli, Criss and (19) Molvin, and discussing them with David Newman on (20) 4/28/95, is that correct? You can look at them.

(21) MR. LIPMAN: Objection. The document (22) speaks for itself and for the

extent the question calls

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(1) for the revelation of privileged or work product (2) information, I instruct the witness not to answer the (3) question.

(4) MR. WOLBRETTE: Could you explain to me how (5) his conversations with David Newman are privileged?

(6) MR. LIPMAN: I voiced my objection. I (7) don't want to take time to discuss —

(8) MR. WOLBRETTE: Well, you understand that (9) we're going to be seeking expenses, and I just want to (10) — this is not — I don't mean this be unfriendly in (11) any way, but —

(12) MR. LIPMAN: I don't take it at all.

(13) MR. WOLBRETTE: You understand we're going (14) to be seeking expenses and so forth in connection with (15) his refusal to answer these questions.

(16) MR. LIPMAN: I don't understand that, but (17) now that you're saying that, I understand that that's (18) what your possible intent would be, sure.

(19) MR. WOLBRETTE: Okay.

(20) MR. LIPMAN: And I hope you understand that (21) if you ask properly phrased questions that don't (22) involve the revelation of privileged or work product

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(1) information, I will not instruct the witness not to (2) answer the question.

(3) Q: Apparently everything I ask about this bill (4) is privileged, according to you. I'm going to show (5) you what we're going to mark — if we've already (6) marked something as a plaintiff's exhibit —

(7) MR. USDIN: As long as it's the same one.

(8) MR. WOLBRETTE: We might as well use that (9) same one.

(10) BY MR. WOLBRETTE:

(11) Q: I'm going to show you what's been (12) previously marked as P-59 and P-58 in prior (13) depositions; P-59 being a cover letter to David (14) Newman, and P-58 being the request for reconsideration (15) which you filed. Is that exhibit, that is, the 58, is (16) that the petition or revival effort that you first (17) filed on behalf of Axonn in this case, in the (18) abandoned patent case?

(19) A: It's an effort that I filed. I don't know (20) if it was the first one or not.

(21) Q: And does that contain attached to it the (22) declaration of Mr. Newman?

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(1) MR. LIPMAN: Objection as to form.

(2) A: Yes, it does.

(3) Q: And what is the date that Mr. Newman (4) executed the declaration?

(5) MR. LIPMAN: Objection. The question lacks (6) foundation. The document speaks for itself.

(7) A: April 28, 1995.

(8) Q: And had you consulted with Mr. Newman or (9) talked to Mr. Newman about this document before he (10) signed this particular version of it?

(11) MR. LIPMAN: Objection, lacks foundation.

(12) A: Yes, I did.

(13) Q: And, had you seen drafts and revived drafts (14) of it before it came into this form?

(15) A: I don't recall.

(16) Q: But you had — you do recall talking to (17) David Newman about what was to go into that (18) declaration, do you not?

(19) MR. LIPMAN: Objection, form.

(20) A: Yes.

(21) Q: And the point of that declaration was to (22) show that because of various things that were going on

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(1) in Dr. Newman's office and his life, that he had (2) missed the deadline date of February the 19th for (3) supplying a document to the patent office; is that (4) correct?

(5) MR. USDIN: Objection as to form and lacks (6) foundation, assumes facts not yet in evidence.

(7) Q: You can answer.

(8) A: The point was to explain the circumstances (9) which I was told by David Newman led to the (10) abandonment.

(11) Q: And those circumstances included his (12) medical problem with his feet, right?

(13) MR. LIPMAN: Objection, lacks foundation.

(14) Q: Is that correct?

(15) A: Yes.

(16) Q: And problems with his office staff; is that (17) correct?

(18) MR. LIPMAN: Objection, lacks foundation.

(19) A: Yes.

(20) Q: And the crashing of his docket system?

(21) MR. LIPMAN: Objection, lacks foundation (22) and form.

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(1) Q: Is that right?

(2) A: Yes.

(3) Q: And the conclusion was that because of all (4) of those things, he had

missed the deadline of (5) February the 19th; is that right?

(6) MR. USDIN: I object to the form. What (7) conclusion are you referring to?

(8) Q: You can answer.

(9) MR. LIPMAN: Also, the question lacks (10) foundation.

(11) A: Well, I'm not sure whose conclusion you're (12) referring to.

(13) Q: The conclusion in the declaration.

(14) MR. LIPMAN: Objection. The document (15) speaks for itself.

(16) A: I'm sorry. What was the conclusion?

(17) Q: Yes. The question was that the conclusion (18) was that because of all those things that we just (19) discussed, David had missed the deadline to file (20) something in the patent office.

(21) MR. LIPMAN: Objection, form, foundation, (22) assumes facts not in evidence, and it's vague and

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(1) ambiguous.

(2) A: To the extent that I understand the (3) question, the answer is yes.

(4) Q: Now, when you were talking to David, (5) various times you were talking to him about this (6) affidavit, did you disclose to him that Axonn had (7) filed a lawsuit against him alleging malpractice in (8) federal court in New Orleans?

(9) MR. LIPMAN: Objection, foundation.

(10) MR. USDIN: I join in the objection. It's (11) also unclear as to time.

(12) A: During what time frame?

(13) Q: Prior to his signing this declaration, (14) which was April the 28th, 1995.

(15) MR. LIPMAN: Objection, assumes facts not (16) in evidence.

(17) MR. WOLBRETTE: What fact does it assume?

(18) MR. LIPMAN: It assumes the fact of when (19) this thing was signed. Just because there's a date on (20) it, how is this witness supposed to know when it was (21) signed? Did you ask him that? Mr. Newman would know (22) that. That's a foundational question, Counsel.

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(1) MR. USDIN: And as to what this witness (2) knew as of any date.

(3) Q: Prior to April the 28th, 1995, did you (4) advise Mr. Newman while you were talking to him about (5) this declaration that he had been sued by Axonn in (6) federal court in New Orleans?

(7) A: No.

(8) Q: Did you know that he'd been sued?

(9) MR. LIPMAN: Objection, form.

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[1] he has knowledge of, whether this is something that he [2] simply — I'm giving you the opportunity to say this [3] is something I simply wouldn't engage in.

[4] A: I want to say one thing.

[5] MR. LIPMAN: Let me voice my objection. [6] Based upon that clarification, the question is [7] certainly argumentative, and now you've taken it to [8] another degree of argumentation. Now you're adding a [9] moral view. You're seeking expert opinion from this [10] witness based upon his understanding of the ethical [11] rules, which you have no foundation for, and you're [12] going way, way beyond the scope of this subpoena. I [13] have the same objections and I'll instruct the witness [14] not to answer the question.

[15] MR. WOLBRETTE: I'm entitled to find out if [16] he doesn't have a recollection —

[17] MR. LIPMAN: Ask him that question.

[18] Q: I'm entitled to find out whether it's more [19] likely than not that he would do such a thing, and I [20] think I'm entitled to find out based on his personal [21] practices and beliefs if he thinks this is something [22] that he might do. Now, if I'm not articulating the

answered.

[23] Q: Did Mr. Newman while you were talking to [24] him about the declaration before he signed it, did he [25] ever express to you a concern that he might be sued?

[26] A: Yes.

[27] Q: And in response to his concern that he [28] might be sued did you tell him — what did you tell [29] him?

[30] A: I told him that that was possible. I also [31] told him that I thought it was best to try to get this [32] case revived to mitigate damages in the event that a [33] suit would be filed.

[34] Q: Mr. Küesters, you would not have told him [35] that it was possible that he would be sued if you knew [36] that he had already been sued, would you?

[37] MR. LIPMAN: Objection to the form of the [38] question. It's argumentative and it's speculative.

[39] Q: Go ahead and answer.

[40] A: Yes, I would not have told him that.

[41] Q: And you were straight with Mr. Newman, [42] weren't you?

[43] A: Yes.

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[44] Q: So now that we've been through that, can [45] you say now that you were not aware of the lawsuit [46] when you talked to Mr. Newman in April 1995 about his [47] declaration?

[48] MR. LIPMAN: Objection to the form of the [49] question and foundation.

[50] MR. USDIN: And this has been asked and [51] answered.

[52] THE WITNESS: Again, I have no independent [53] recollection of exactly when I learned from Michael [54] Eckstein when suit was filed.

[55] BY MR. WOLBRETTE:

[56] Q: Based on your recollection that Mr. Newman [57] asked you about the suit and your telling him that it [58] was possible, do you think it is now more likely than [59] not that you did not know that a suit had been filed [60] when you talked to him about his declaration?

[61] MR. LIPMAN: Objection, seeks speculation, [62] and I think it has two or three "nots." I'm a little [63] confused, but go ahead.

[64] A: I think it's more likely than not.

[65] Q: That you had not been informed of the

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[66] lawsuit, right?

[67] A: At that time.

[68] Q: The April bill —

[69] MR. LIPMAN: Could I ask you to hold on [70] just a moment?

[71] MR. WOLBRETTE: I'm sorry. Why don't we [72] take a five-minute break.

[73] (Recessed at 10:29 a.m.) [74] (Reopened at 10:38 a.m.)

[75] BY MR. WOLBRETTE:

[76] Q: Looking at your April 28, 1995 bill, which [77] has been marked D-2 if I'm not mistaken; is that [78] right?

[79] A: Yes.

[80] Q: Does that bill indicate that you had [81] conversations — and I'm not asking you for the [82] substance of those conversations; I'm just asking you [83] if the bill indicates that you had conversations with [84] Michael Eckstein on April 4th, 6th and 24th?

[85] MR. LIPMAN: Objection. The document [86] speaks for itself.

[87] A: Yes.

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[88] Q: Do you have a May bill in your stack? [89] Strike that. We're running out of time, so let's [90] forget that question. Let's go back to the April 28th [91] bill. Does that bill indicate that you spoken with [92] Britton Sanderford on April 6th and April the 21st? [93] And again, I'm not asking you for the substance of [94] those conversations, just if that's what the bill [95] reflects.

[96] MR. LIPMAN: Objection. The document [97] speaks for itself.

[98] A: Yes.

[99] Q: And does it also show that you spoke with [100] Steve Fant on April the 21st and April the 28th?

[101] MR. LIPMAN: Objection. The document [102] speaks for itself.

[103] A: Yes.

[104] Q: Now I am going to ask you about the [105] substance of those conversations, and you may want to [106] pause after my question because I suspect there might [107] be an objection. At any time during any of these [108] conversations did Mr. Eckstein or Mr. Sanderford or [109] Mr. Fant advise you that Axonn had sued Newman for

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[110] malpractice in federal court in New Orleans?

[111] MR. LIPMAN: Objection, compound. Also, [112] the question seeks privileged or work product [113] information, and as a consequence, I instruct the [114] witness not to answer the question.

[115] MR. USDIN: I join in.

[116] Q: Did Mr. Fant tell you about a lawsuit that [117] had been filed against Mr. Newman in March of 1995 in [118] federal court in New Orleans during your con-

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[119] finished and the witness already

versations (10) on April 21st and April 28th?

(11) MR. LIPMAN: Objection, assumes facts not (12) in evidence and seeks privileged or work product (13) information and I instruct the witness not to answer (14) the question.

(15) MR. USDIN: Same objection, and I'll join (16) and I think this is argumentative in view of the prior (17) line of questioning that you've been through with this (18) witness regarding what his recollection was, and that (19) you've already asked this witness what he knew.

(20) Q: Did Mr. Sanderford advise you about the (21) lawsuit Axonn filed against Mr. Newman in March of (22) 1995 when you spoke to him on April the 6th and April

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(1) the 21st?

(2) MR. USDIN: The same thing, objection. It (3) calls for disclosure of privileged communications. (4) It's also argumentative in view of the fact you (5) already asked this witness what he knew.

(6) MR. LIPMAN: I join in.

(7) Q: Did Mr. Eckstein when you spoke to him on (8) April the 4th, April the 6th and April the 24th in any (9) of those conversations advise you that Axonn had sued (10) Mr. Newman in March of 1995 in federal court of New (11) Orleans?

(12) MR. USDIN: Same objection, seeks the (13) disclosure of privileged communications, (14) attorney-client privileged communications; also is (15) argumentative in view of your previous questions and (16) the testimony regarding what this witness knew as (17) opposed to what was the substance of conversations he (18) had with his client.

(19) MR. WOLBRETTE: Is he being instructed not (20) to answer all these questions?

(21) MR. USDIN: Yes.

(22) MR. LIPMAN: And I am instructing him not

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(1) to answer the question, and by me not joining in each (2) and every one should not be taken in any way that I do (3) not agree. If I disagree, I will certainly let you (4) know.

(5) MR. WOLBRETTE: Do you want to have just a (6) stipulation then that if one person objects, the other (7) person joins in unless you opt out?

(8) MR. USDIN: That sounds good.

(9) Q: And again, Mr. Kuesters, you're going to do (10) what your lawyers — the lawyer tells you? Not, correct?

(11) A: Yes, I am, unless I indicate otherwise.

(12) Q: Unless you opt out. I want to show you (13) what's been marked as P-14, a February 17, 1994 (14) memorandum to Bitton from Erin, re: David Newman (15) matters. Can you take a look at that please? Read (16) through it, take your time.

(17) A: Okay.

(18) Q: Have you ever seen that before I just (19) handed it to you and asked you to read it?

(20) MR. LIPMAN: You may answer whether you've (21) ever seen the document before.

(22) A: No.

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(1) Q: Has anyone ever read to you what's (2) contained in the document?

(3) MR. LIPMAN: I object to the form of the (4) question. Has somebody read to him from this (5) document?

(6) MR. WOLBRETTE: Correct.

(7) THE WITNESS: No.

(8) Q: Has anyone described to you the substance (9) of the document?

(10) MR. LIPMAN: I object to the question and I (11) think the answer to that question would reveal (12) privileged or work product information, and on that (13) basis, I instruct the witness not to answer that (14) question unless the information — unless in answering (15) the question would not reveal privileged or work (16) product information, which I don't think is the case.

(17) A: What's the question? I'm sorry.

(18) Q: Has anyone ever described to you the (19) substance of that document prior to today?

(20) A: No.

(21) Q: I take it then that document was not in (22) your files?

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(1) MR. LIPMAN: I'm lost on that question. He (2) said he's never seen it before.

(3) MR. WOLBRETTE: I'm simply confirming that (4) it's not in his file. That seems a logical (5) conclusion. All it requires is a yes to the question.

(6) MR. LIPMAN: I object to the question (7) because it lacks foundation.

(8) THE WITNESS: It's not in my file.

(9) Q: During the time in April of 1995 when you (10) were preparing the revival attempt, the first one that (11) you filed, the one that — strike that. We've been (12) discussing the revival attempt that you filed with (13) the David Newman's declaration. During that time frame, (14) prior to your filing the actual petition, were you aware of (15) any other declaration of

was the (15) information, the substance of that memorandum ever (16) made known to you by Axonn?

(17) MR. LIPMAN: Objection to the form of the (18) question.

(19) A: Which information are you talking about?

(20) Q: Fair question.

(21) MR. LIPMAN: That's why I objected to the (22) form of the question.

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(1) Q: I'm specifically referring to the last (2) paragraph, and I'm specifically in that paragraph (3) referring to the statement, "Dave is waiting on Mike's (4) decision as to whether it would be more advantageous (5) for us on the JA suite to let the patent go (6) unintentionally abandoned" — I'll leave out the (7) parenthesis. "The problem is now that if we want to (8) file a disgruntled employee affidavit, it needs to be (9) in the patent office by this Friday." Those two (10) lines. Was that information ever provided to you (11) that (12) there was a document in Axonn's file that contained (13) that information?

(14) MR. LIPMAN: I object to the form of the (15) question, and the question as I understand it, those (16) two sentences relate to on their face the advice or (17) possible advice of counsel as to what should or should (18) not or might or might not be done relative to this (19) case. Based upon that, the question seeks privileged (20) or work product information and I instruct the witness (21) not to answer the question.

(22) BY MR. WOLBRETTE:

(1) Q: When I ask these questions about your

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(1) petition to revive, unless I say differently, I'm (2) talking about the one with David Newman's declaration (3) that we've been talking about up until now that we've (4) marked as an exhibit today. Do you understand?

(5) A: There were several declarations.

(6) MR. LIPMAN: He doesn't seem to understand (7) that. That's the problem.

(8) A: I believe there were.

(9) Q: Several David Newman declarations?

(10) A: Yes.

(11) Q: We're talking about P-58.

(12) MR. LIPMAN: You keep calling that "the (13) petition," Counsel, like it's the only one, and that's (14) the problem. But if you want to talk about 58, that's (15) fine.

(16) MR. WOLBRETTE: Counsel, I'm not a man of April

David Newman other than the (18) one that's attached to —

(19) THE WITNESS: Well, I may be wrong.

(20) BY MR. WOLBRETTE:

(21) Q: But you know, I could be wrong too, so (22) let's just try to move on. We've been talking about

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(1) Exhibit P-59 — 58, okay? The one that is stamped (2) received May the 1st in the office — is that the (3) patent office?

(4) A: Yes, that's the PTO stamp.

(5) Q: And that's the one that contains — or has (6) attached to it the declaration signed by David Newman (7) which says — which bears the date April the 28th, (8) 1995, correct?

(9) A: It includes the David Newman declaration (10) dated April 28th, 1995.

(11) Q: So for shorthand purposes, when I'm talking (12) in the next set of questions about the petition to (13) revive, I'm talking about that one that you've got in (14) your hand right there, okay? Do you understand me?

(15) A: Yes, I do.

(16) Q: At the time that you were preparing that (17) petition to revive, were you aware that Axonn had in (18) its files a memorandum dated February the 17th, 1993 (19) stating, "The problem now is that if we want to file a (20) disgruntled employee affidavit, it needs to be in the (21) patent office by this Friday"?

(22) A: No.

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(1) Q: Did you know at that time that, the time (2) that you were preparing this, the one in front of you, (3) the P-59, that Axonn had in its files a memorandum (4) dated February the 17th, 1993 that states, "It looks (5) like if we don't make a decision today, the decision (6) will be made for us and the patent will go abandoned"?

(7) MR. USDIN: You're asking if he knew they (8) had a memo stating that?

(9) BY MR. WOLBRETTE:

(10) Q: Yes.

(11) A: No.

(12) Q: When you were preparing that petition in (13) front of you, P-58 or 9 —

(14) MR. LIPMAN: The previous question had said (15) 59.

(16) Q: I'm sorry, I should say that. It is 58. (17) The cover letter's 59. When you were preparing P-58, (18) did you know that there was in Axonn's files a (19) document indicating that Axonn was aware that (20) something had to be filed by February the 19th or the (21) patent would go abandoned?

(22) MR. LIPMAN: Which compound question do you

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(1) want him to answer? The first one or the second one?

(2) MR. USDIN: I object to the form and ask (3) you if you would just restate it.

(4) Q: Did you know when you were preparing P-58 (5) that Axonn had in its files a document that indicated (6) that Axonn was aware that if something wasn't filed in (7) the patent office by February the 19th, the patent (8) would go abandoned?

(9) MR. LIPMAN: I object to the form of the (10) question. The witness of course is reading Exhibit (11) P-14. That wasn't your question. If you want to ask (12) that question, you may. The question's not limited to (13) P-14. It's anything, according to the way the (14) question's phrased.

(15) A: The answer is no.

(16) Q: Would that have made a difference to you?

(17) MR. USDIN: Objection, calls for (18) speculation.

(19) MR. LIPMAN: Also, I object to the question (20) because to answer it would reveal the mental processes (21) and thought processes of a lawyer as to what he might (22) do or might not do based upon a given situation. It

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(1) also seeks expert opinion as a result, and so for (2) those reasons, I instruct the witness not to answer (3) the question.

(4) Q: In P-58, you made several arguments as to (5) why the patent should be revived; is that correct?

(6) A: Yes.

(7) Q: And one of the arguments was based on 137A, (8) unavailability or unavoidable abandonment; is that (9) correct?

(10) MR. LIPMAN: Objection to the form of the (11) question. You can reread the document if you need to (12) to answer it.

(13) A: I'd have to review the document.

(14) Q: Sure. Take a look at it.

(15) A: One of the arguments was — renew the (16) petition to revive due to unavoidable abandonment (17) under 37 CFR 1.37A.

(18) Q: And that was the argument on which you used (19) Mr. Newman's declaration, was it not, the support for (20) that argument?

(21) MR. LIPMAN: Objection, form, vague and (22) ambiguous. The document speaks for itself.

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(1) A: The argument relied on Newman's declaration (2) to substantiate facts.

(3) Q: And wasn't the gist of the argument that (4) this patent abandonment was unavoidable because (5) Mr. Newman had missed the deadline of February the (6) 19th because of all of the various problems he was (7) having, with his foot, with his staff and with his (8) docket crashing?

(9) MR. LIPMAN: Objection, vague and (10) ambiguous. The document speaks for itself.

(11) A: Generally I believe that's true.

(12) Q: If in fact Axonn was aware of the February (13) 19 deadline and made a conscious decision to allow the (14) application to go abandoned, you could not in good (15) conscious submit — if you were aware of it, you (16) couldn't submit that argument that you're holding in (17) your hand, could you?

(18) MR. LIPMAN: Objection, hypothetical, (19) speculative, argumentative, seeks expert opinion, and (20) I instruct the witness not to answer the question. (21) This is a fact deposition based upon a subpoena for (22) this witness to give factual testimony, not expert

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(1) opinions.

(2) Q: I'll just ask one more on that line and you (3) can object and then I'll move on to something else (4) quickly because I understand you do need to leave at (5) 11:00. Is that — We can go a few minutes over?

(6) MR. LIPMAN: A couple of minutes, yes. If (7) that would help you, we're willing to go —

(8) MR. WOLBRETTE: I'm really trying to (9) accommodate you. We do need to go back to the (10) subpoena in one second.

(11) MR. LIPMAN: I appreciate that.

(12) Q: Let me ask you just one more question on (13) this line. If you had information in your possession (14) in April of 1995 prior to submitting P-58 to the (15) patent office that indicated to you that Axonn was (16) aware of the February 19th deadline and consciously (17) decided to allow it to pass for whatever reason, would (18) it violate your duty to the patent office, your duty (19) of candor, to have filed this document that's before (20) you?

(21) MR. LIPMAN: Objection, speculative, (22) hypothetical, argumentative, seeks expert opinion.

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(1) Besides, it goes to 37 CFR part 10, (2) relating to the (3) code of professional

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responsibility for the patent and trademark office, and it clearly seeks opinion from this witness as to what he might do or what some other lawyer might do under a given set of circumstances, and I instruct the witness not to answer the question.

Q: Okay. It is 11:00. I can assure you I have a lot more questions relating to his bills and things that I presume that you would object to since you've done in the past. And rather than go into that now and waste time since you all need to leave, let me return the subpoena and you're going to give us a few more minutes to talk about that?

MR. LIPMAN: Yes, I will. But just so it's clear, you're assuming I'll make objections based upon the bills. Let's make it very clear, Counsel. I make objections based upon questions, not on subject matter.

MR. WOLBRETTE: I think it's pretty clear that every question I've asked him about anything on the bill you've objected to.

MR. USDIN: I don't agree with that

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characterization.

MR. WOLBRETTE: Do you want me to go back to the bills?

MR. LIPMAN: You use the time remaining any way you want.

Q: We've seen already dealing with the subpoena response that this April 23, 1995 bill was not produced, and I think the explanation that you gave may have been that this was — you think this might be because this was a 001 file at that time? Is that possibly the explanation for that, the book-keeping department didn't pick up the 001 designation?

A: I didn't ask for the 001 bills because I had forgotten that it was first docketed as a 001.

Q: Well, what about the rest of the response to the subpoena? Do we have the 001 file materials in this box?

MR. LIPMAN: Objection. It assumes facts not in evidence. Excuse me a minute.

MR. WOLBRETTE: I have no idea what that objection means.

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Q: The subpoena was directed to you, Mr. Kuesters; is that correct?

A: I will check the 001 file. I did not check that.

MR. LIPMAN: As counselor of Mr. Kuesters, let me make it clear that this subpoena, while directed to Mr. Kuesters, was on behalf of the firm. Mr. Kuesters doesn't have any personal files. These are firm files and firm documents, and based upon that, Mr. Kuesters on behalf of the firm made a reasonable effort to get reasonably responsive documents.

Q: Dr. Kuesters, do the documents which you have produced contain the 001 file materials?

MR. LIPMAN: Objection, foundation.

A: I don't know.

Q: Well, if they do not, then the subpoena is that — this response is not complete and it's clear that in other respects the response is not complete, as we've already gone through. Let me also —

MR. LIPMAN: Well, I object to your characterization, assuming that wasn't the —

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questioning, that was just your editorial comments, and if you don't want to ask the witness, I'll voir dire him that he made a reasonable effort on the behalf of the firm to get responsive documents to the subpoena, and if in fact he did not get all responsive documents, we will make a reasonable effort to supplement.

MR. WOLBRETTE: I'm making no aspersions about Mr. Kuesters. I believe he probably did make a reasonable effort. I'm just trying to find out what has not been produced. We're obviously going to be doing this another time, so we want to make sure that we get all those documents before we start that one.

We have reviewed this box and we do not find the Newman declaration that is attached to P-58. We do not find P-58 or any other revival petition which was filed. We don't find any drafts of the Newman declaration, we don't find any other declarations filed with the PTO. We don't find materials filed with PTO prior to your retention, which are now public as part of the file. So we just point this out to you to suggest some areas where

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perhaps there might be something else that has not been produced.

Also, we have — the only correspondence with David Newman that we find in here — and when I say "we," I guess I'm using the — I guess I shouldn't do that. While we've been sitting here, Ms. Manning has been looking through this, so I'm just telling you what she's telling me. The only letter she sees dealing with David Newman, correspondence, is a letter to Mr. Newman of April — I'm sorry — of

May the 9th, '95. And so if there are any other letters to Mr. Newman, we would appreciate you making them available to us. Is it possible that there are other file materials, 001 file materials that have not been produced or any of these things —

MR. LIPMAN: Wait. Are you finished with your question?

Q: Well, did you look for these things that I've just gone through and not found them or is it possible that there are some other things that you didn't look for? And again, I'm not accusing you of not doing anything. I'm just trying to find out

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what's left to find.

MR. LIPMAN: I object to the form of the question, the very compound nature of the question. Mr. Kuesters, sitting here today, do you believe there's a likelihood there might be other responsive documents that after another reasonable effort you might find?

THE WITNESS: I don't know.

MR. LIPMAN: Are you going to make a reasonable effort to find other documents if they exist?

THE WITNESS: Yes.

MR. WOLBRETTE: And we would also request that we be provided a log of any documents which are withheld as privileged.

MR. LIPMAN: That question I'm sure is directed to —

MR. WOLBRETTE: If they know. It's hard to say who's asserting the privilege.

MR. LIPMAN: Let's make one thing clear. The privilege belongs to the client, and the client is Axonn, Counsel. You know that. And I'm asserting —

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MR. WOLBRETTE: That's why I'm confused by your constant objections.

MR. REUTER: We said that —

MR. WOLBRETTE: We said that late in the game.

MR. LIPMAN: Counsel, let me make it clear here. I am here representing the witness and the law firm.

MR. WOLBRETTE: You made that clear.

MR. LIPMAN: Let me finish — that's a third party here. We are merely custodian of documents and information that are owned and possessed by the client. The privilege we're asserting is a privilege on behalf of the owner of the information. That

owner has its own counselor here present. I think the record is crystal clear what's going on here. You can ask questions that are not clearly directed to producing or disclosing privileged or work product information, you'll get what you need. That's the problem.

Q: Thank you. I'm going to show you a document that we'll mark as D-3, declaration of Donald

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L. Schilling, Ph.D. Would you read that please?

A: Okay, I've read this.

Q: Have you ever seen this before today?

A: No.

Q: Has anyone ever read from this document to you to your knowledge at any time?

A: No.

Q: Has anyone ever discussed the substance of this document with you prior to today?

MR. LIPMAN: Objection, vague and ambiguous.

A: No.

Q: If you had had this document in your possession after this patent that we've been talking about was revived but prior to when it was issued in January of this year, would you have felt it necessary to bring to the attention of the patent office the references that are contained in this document?

MR. LIPMAN: Objection, hypothetical, speculative, seeks expert testimony from a lawyer as to compliance with 37 CFR section 1.56, amongst others. As a result, I instruct the witness not to.

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answer the question.

MR. WOLBRETTE: Okay. I can keep going or, fellows, it's ten after 11. If this is a good time for you guys to stop, I'm happy to stop or I can keep going.

MR. LIPMAN: I think it's a good time for us to stop. Clearly there's a likelihood that we'll have to continue.

MR. WOLBRETTE: I think so.

(A document was marked as Defendant's Exhibit Number 3.)

(Deposition concluded at 11:09 a.m.)

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UNITED STATES OF AMERICA)

ss:

COMMONWEALTH OF VIRGINIA)

I, ECKHARD KUESTERS, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

ECKHARD KUESTERS

Subscribed and sworn to before me

this day of 19

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UNITED STATES OF AMERICA)

ss:

COMMONWEALTH OF VIRGINIA)

I, KAREN YOUNG, a Notary Public within and for the Commonwealth of Virginia, do hereby certify that the witness whose deposition is hereinbefore set forth was duly sworn and that the within transcript is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this day of 199

My Commission Expires:

June 30, 1998

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WITNESS: It is your right to read your deposition and make any changes in form or substance. Note the reason for any changes directly on the errata sheet.

Please sign and date the errata sheet and your deposition in the spaces provided. You are signing this transcript subject to the changes you have made on the errata sheet. Unless otherwise agreed to by counsel to this deposition, you must sign before a notary public.

Return the original errata sheet and signature page to the deposing attorney (attorney asking questions) promptly! Court rules require completion of this process within 30 days after receipt of the transcript or signature is deemed waived.

DEPOSING ATTORNEY: Upon receipt of the signed errata sheet and signature page, please distribute copies to all parties in attendance and place the original signed pages in the original transcript.

If you do not receive the signed errata sheet and signature page within 30 days after receipt of the original transcript, you may assume that signature has been waived.

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